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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

LA MERLE RONNIE JOHNSON,

Petitioner,

v.

ROSANNE CAMPBELL, Warden,

Respondent.

C 07-2921 JSW

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS; MEMORANDUM OF POINTS AND AUTHORITIES

Judge: The Honorable Jeffrey S. White

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

LA MERLE RONNIE JOHNSON, Petitioner, **v.** **ROSANNE CAMPBELL, Warden,** Respondent.	C 07-2921 JSW **ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS; MEMORANDUM OF POINTS AND AUTHORITIES** Judge: The Honorable Jeffrey S. White

As an Answer to the Petition for Writ of Habeas Corpus filed by California state inmate LaMerle Johnson, proceeding pro se in this habeas corpus action, Respondent Warden Richard Subia[1/] admits, denies, and alleges as follows:

1. Johnson is in the lawful custody of the California Department of Corrections and

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1. The proper respondent in this action is now Acting Warden Richard Subia, not former Warden Rosanne Campbell. *Stanley v. Cal. Supreme Court*, 21 F.3d 359, 360 (9th Cir. 1994) (holding that the warden where the petitioner is incarcerated is the proper respondent); Rule 2(a), 28 U.S.C. § 2254. Moreover, because the actions complained of in Johnson's petition concern a parole consideration hearing, the Board of Parole Hearings is used interchangeably with Respondent.

Rehabilitation serving a life sentence following his 1996 conviction in San Mateo County for kidnaping for ransom, second degree robbery, and assault with a firearm. (Ex. A, Abstract of Judgement.)

2. Johnson's Petition does not challenge his conviction; instead, he challenges the Board of Parole Hearings' March 22, 2006 decision finding him unsuitable for parole. Specifically, he alleges that his federal due process rights were violated because there is no evidence to support the Board's decision. (*See generally* Petn.)[2/] He also alleges that the Board has an underground policy of denying parole at an inmate's initial parole consideration hearing, and that the district attorney was estopped from opposing his parole because of a conflict of interest and unreasonable bias. (*Ibid.*)

3. On July 6, 1993, Johnson and his co-criminals kidnaped Ellis Foots, a drug dealer, by posing as police officers and "arresting" Foots. (Ex. B, Decision, Court of Appeal of the State of California, First Appellate District, No. A073308, at 2; Ex. C, Probation Officer's Report, at 4-7; Ex. D, Life Prisoner Evaluation Report, at 1-2; Ex. E, Subsequent Parole Consideration Hearing, at 13-33, 55-57, 62-71, 77-79.) They took Foots to an apartment, taking his personal belongings, and binding his hands and feet with duct tape. (Ex. B at 3, Ex. C at 4-7; Ex. D at 1-2; Ex. E at 77-79.) They also used the tape to blindfold him. (*Id.*) When Foots tried to loosen the tape, one of the men shot him in the arm with a stun gun and put handcuffs on him. (*Id.*)

4. After an unsuccessful attempt to rob Foots's home for $8,000, Johnson and his co-criminals decided to hold Foots for ransom and told Foots's friend that they would kill Foots if their demands were not met. (Ex. B at 3; Ex. C at 4-7; Ex. D at 1-2; Ex. E at 13-14, 77-79.) Foots's friend paid the ransom as part of a failed attempt by police to locate Foots, but another co-criminal (who was arrested while attempting to use Foots's credit cards) had already disclosed Foots's location to police. (Ex. B at 4; Ex. C at 4-7; Ex. D at 1-2; Ex. E. 13-14, 77-79.) The police rescued Foots, who was handcuffed, bound, and blindfolded, and police officers found the ransom money. (*Id.*)

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2. Respondent liberally construes Johnson's arguments in Claim I of his Petition to challenge the sufficiency of the evidence. (Petn. at 8-16.)

5. On March 22, 2006, Johnson was provided an opportunity to be heard during his parole consideration hearing (Ex. B at 13-76), and the Board issued a decision explaining why he was found unsuitable for parole. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979) (opportunity to be heard and a reasoned decision is the only clearly established United States Supreme Court law regarding an inmate's federal due process rights at parole consideration hearings); (Ex. E at 77-84). In denying him parole, the Board found that the commitment offense was carried out in a cruel and callous manner with an exceptionally callous disregard for human suffering in that Johnson helped kidnap Foots for money, holding him in an apartment for several days, where Foots was handcuffed, bound, and blindfolded with duct tape. (*Id.* at 78-79, 82-83.) The Board also noted that as the crime escalated, Johnson could have stopped his criminal but failed to do so. (*Id.* at 81.) Moreover, the Board felt that Johnson was being dishonest with the Board, doubting his remorse for the victim and his crime. (*Id.* at 80-81, 83.) Finally, the Board found that the motive for the crime was inexplicable and trivial in relation to the offense. (*Id.* at 82-83.) In addition to the commitment offense, the Board cited Johnson's criminal history, inadequate parole plans, and opposition from the district attorney as a basis for denying him parole. (*Id.* at 79-82.) Finally, the Board recommended that Johnson get self-help to help him understand the nature of his commitment offense and the impact his crime had on the victim. (*Id.* at 83-84.)

6. Johnson filed a petition with the San Mateo County Superior Court raising substantially the same challenges to the Board's 2006 decision that he now asserts in his federal Petition. (Ex. F, Superior Court Pet. & Denial.)[3/] The superior court denied Johnson's petition on October 16, 2006 in a twelve-page reasoned decision. (*Id.*) First, the court concluded that there was some evidence supporting the Board's determination that Johnson had a callous disregard for Foots at the time the crime was committed, that he currently lacked sincerity and remorse for his crime, and that he failed to have adequate parole plans. (*Id.* at 7-9.) Moreover,

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3. To avoid repetition and unnecessary volume, the exhibits attached to McCormick's state court petitions have been removed. Respondent will provide these documents upon the Court's request.

the court rejected Johnson's argument that the Board improperly relied on immutable factors, noting that several of the factors were subject to change over time, *e.g.*, Johnson's honesty, remorse, and his parole plans. (*Id.* at 8-9.) Second, the court found that Johnson's claim regarding the Board's alleged underground policy of initially denying an inmate parole was irrelevant because the Board made specific factual findings justifying its decision to deny Johnson parole. (*Id.* at 9-10.) Third, the court found that there was no evidence of a conflict of interest or unreasonable bias by the district attorney. (*Id.* at 11.) Finally, the court concluded that the Board did not act arbitrarily in evaluating Johnson's commitment offense or in recommending rehabilitative activities while in prison. (*Id.* at 11.)

7. Dissatisfied, Johnson pursued his claims by filing substantially the same petition for writ of habeas corpus in California's First Appellate District, which was denied on November 22, 2006. (Ex. G, Appellate Court Pet. & Denial.)

8. Johnson then pursued his claims by filing substantially the same petition for writ of habeas corpus in the California Supreme Court, which was denied on May 23, 2007. (Ex. H, Supreme Court Pet. & Denial.)

9. Respondent admits that Johnson has exhausted his state court remedies regarding his challenges to the sufficiency of the evidence used by the Board to find him currently unsuitable for parole, the Board's alleged underground policy of denying inmates parole during their initial parole consideration hearing, and the district attorney's alleged opposition to Johnson's parole based on a perceived conflict of interest and unreasonable bias. Respondent denies that Johnson has exhausted his claims that the Board improperly required him to admit guilt for his crime and that his equal protection rights were violated by the Board's parole denial. (Petn. at 13-16.) Johnson failed to exhaust his state court remedies by asserting these claims in his petition to the California Supreme Court and thus, Respondent will not address them on the merits. 28 U.S.C. § 2254(b)(1)(A); *see O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (a state inmate must properly exhaust available state court remedies before a federal court may consider granting habeas corpus relief). Respondent denies that Johnson has exhausted his claims to the extent that they are more broadly interpreted to encompass any systematic issues beyond this

particular review of parole denial.

10. Respondent denies that the state courts' adjudication of Johnson's claims was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1).

11. Respondent denies that the state courts' adjudication of Johnson's claims was based on an unreasonable determination of the facts in light of the evidence. 28 U.S.C. § 2254(d)(2).

12. To preserve the issue, Respondent denies that Johnson has a federal liberty interest in parole under California Penal Code section 3041, notwithstanding the Ninth Circuit's contrary decision in *Sass v. Cal. Bd. Prison Terms*, 461 F.3d 1123, 1127 (9th Cir. 2005). *See Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 12 (1979) (liberty interest in conditional parole release date created by unique structure and language of state parole statute); *In re Dannenberg*, 34 Cal. 4th 1061, 1087 (2005) (California's parole scheme is a two-step process that does not impose a mandatory duty to grant life inmates parole before a suitability finding); *Sandin v. Connor*, 515 U.S. 472, 484 (1995) (no federal liberty interest in parole because serving a contemplated sentence does not create an atypical or significant hardship compared with ordinary prison life). Thus, Johnson fails to assert a basis for federal jurisdiction.

13. To preserve the issue, notwithstanding the Ninth Circuit's contrary decision in *Irons v. Carey*, 505 F.3d 846, 851 (9th Cir. 2007), Respondent denies that the Supreme Court has ever clearly established that a state parole board's decision must be supported by some evidence.

14. Respondent affirmatively alleges that if the some-evidence standard applies to federal review of parole denials, there is some evidence supporting the Board's 2006 decision to deny Johnson parole.

15. Respondent alleges that there is no clearly established federal law precluding the Board's reliance on Johnson's commitment offense or any other immutable factor as a reason to deny him parole. *Carey v. Musladin*, __ U.S. __, 127 S. Ct. 649, 654 (2006) (United States Supreme Court emphasized that under AEDPA, only Supreme Court holdings regarding the specific issue presented may be used to overturn valid state court decisions).

16. Respondent denies that the state court unreasonably rejected Johnson's claim that the

Board has an underground policy of not granting parole to an inmate during his initial parole consideration hearing.

17. Respondent denies that the state court unreasonably rejected Johnson's claim that the district attorney objected to Johnson's parole because of a conflict of interest or unreasonable bias.

18. Respondent denies that the Board's decision denying parole violated Johnson's federal due process rights.

19. If the petition is granted, Johnson's remedy is limited to a new parole consideration hearing before the Board that comports with due process. *Benny v. U.S. Parole Comm'n*, 295 F.3d 977, 984-985 (9th Cir. 2002); *In re Rosenkrantz*, 29 Cal.4th 616, 658 (2002).

20. Respondent denies that an evidentiary hearing is necessary in this matter. 20 U.S.C. § 2254(e).

21. Respondent admits that Johnson's claim is timely under 28 U.S.C. § 2244(d)(1), and that the petition is not barred by the non-retroactivity doctrine.

22. Except as expressly admitted in this Answer, Respondent denies the allegations of the Petition.

23. Johnson fails to state or establish any grounds for habeas corpus relief.

For the reasons stated in this Answer and in the following Memorandum of Points and Authorities, this Court should deny the Petition.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Johnson's Petition should be denied because he received the only process due under clearly established Supreme Court authority: the opportunity to be heard and a decision. Thus, the Board's decision did not violate his federal due process rights. Finally, if the some-evidence test is applicable, and Respondent maintains it is not, Johnson's Petition should be denied because there is some evidence supporting the Board's decision denying Johnson parole.

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ARGUMENT

THE STATE COURTS' ADJUDICATION OF JOHNSON'S CLAIMS WAS NEITHER CONTRARY TO, NOR INVOLVED AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW, NOR WAS IT BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS.

A. The Standard of Review for Federal Habeas Petitions Brought by State Prisoners Is Highly Deferential to the State-Courts' Rulings.

Federal habeas relief for state prisoners was tightly constrained by the "highly deferential standard for evaluating state-court rulings" imposed by Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). Under AEDPA, a state prisoner's federal habeas petition must be denied unless the state court's adjudication was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d).

Under AEDPA, a state court decision is " contrary to" clearly established Supreme Court precedent "if it 'applies a rule that contradicts the governing law set forth in [Supreme Court] cases,' or if it 'confronts a set of facts that are materially indistinguishable from a decision'" of the Supreme Court and nevertheless arrives at a different result. *Early v. Packer*, 573 U.S. 3, 8 (2002) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000)). "What matters are the holdings of the Supreme Court, not the holdings of lower federal courts." *Plumlee v. Masto*, 512 F.3d 1204, 1210 (9th Cir. 2008) (en banc).

Under the "unreasonable application" clause of § 2254(d) (1), a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions, but unreasonably applies that principle to the facts of the case. *Williams*, 529 U.S. at 413. A federal habeas court may not grant the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 412; *see also Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (it is "not enough that a federal habeas court, in its independent review of the legal question, is left with a 'firm conviction' that

the state court was 'erroneous.'").

The federal court looks to the last reasoned state court decision as the basis for the state court judgment. *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002); *see Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991).

B. Johnson's Petition Should Be Denied Because He Received All Process Due: an Opportunity to Be Heard and an Explanation for the Parole Denial.

The Supreme Court has found that a parole board's procedures are constitutionally adequate if the inmate is given an opportunity to be heard and a decision informing him of the reasons he did not qualify for parole. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, *supra*, 442 U.S. at 16. As a matter of "clearly established" federal law then, a challenge to a parole decision will fail if the inmate has received the protections required under *Greenholtz*. *See Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988); *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005) (Supreme Court cited *Greenholtz* approvingly for the proposition that the "level of process due for inmates being considered for release on parole includes opportunity to be heard and notice of any adverse decision" and noted that *Greenholtz* remained "instructive for [its] discussion of the appropriate level of procedural safeguards.") Johnson does not deny that he received an opportunity to be heard or the reasons he was denied parole. (Ex. B.) Thus, the state courts' decisions were not contrary to clearly established federal law.

C. The Some-Evidence Standard of Review Is Not Clearly Established Federal Law by the United States Supreme Court for Challenging Parole Denials.

The some-evidence standard does not apply in federal habeas proceedings challenging parole denials because it is not clearly established federal law. The United States Supreme Court has reiterated that for AEDPA purposes, "clearly established federal law" refers only to the holdings of the nation's highest court on the specific issue presented. *Carey v. Musladin*, __ U.S. __, 127 S. Ct. at 653. In *Musladin*, a convicted murderer filed a federal habeas petition after a state appellate court upheld the victim's family members' wearing of buttons with the victim's photograph during the trial, concluding that it was not inherently or actually prejudicial based on two United State Supreme Court cases. *Id*. at 651-52. The Court of Appeals for the

Ninth Circuit reversed, finding that the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law – the prejudice test in the two United State Supreme Court cases. *Id*. at 652. In vacating the Ninth Circuit's decision, the Supreme Court stated that the cases relied on by the Ninth Circuit involved state-sponsored courtroom practices – making a defendant wear prison clothing during trial and seating four uniformed troopers behind a defendant during trial – that were unlike the private action of the victim's family members' wearing of buttons. *Id*. at 653-54. The *Musladin* Court further noted that the two cases were not clearly established federal law on the issue because the United States Supreme Court "has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial." *Id*. at 653. Consequently, the Court held that the Ninth Circuit erred by importing a federal test for prejudicial state action in a courtroom to private spectators' courtroom conduct. *Id*. at 654.

Again, in *Schriro v. Landrigan*, __ U.S. __, 127 S. Ct. 1933, 1942 (2007), the United States Supreme Court factually distinguished two of its cases that the Ninth Circuit cited in holding that the state court unreasonably applied clearly established federal law when finding ineffective assistance of counsel claims frivolous. In *Landrigan,* a criminal defendant questioned by the judge told the court that he did not want mitigating evidence presented (his attorney advised otherwise). *Id.* at 1937-38. The United States Supreme Court reasoned that the two cases relied on by the Ninth Circuit were not clearly established federal law by factually distinguishing them. *See id.* at 1942. The Court noted that one case involved an attorney's failure to provide mitigating evidence and the other case concerned a defendant who refused to help develop mitigating evidence. *Id. See also Wright v. Van Patten*, ___ U.S. ___, 128 S.Ct. 743, 746 (2008) (United States Supreme Court reversed the Seventh Circuit and upheld a state appellate court determination that the defendant's right to counsel was not violated when defense counsel appeared by speaker phone at a hearing because Supreme Court precedents did not clearly hold that counsel's participation by speaker phone amounted to complete denial of counsel, the equivalent to total absence. Accordingly, the Court concluded that the state appellate court's holding was not contrary to, or an unreasonable application of, clearly

established federal law, as required to grant federal habeas relief).

Likewise, several recent Ninth Circuit decisions also emphasize that there can be no clearly established federal law where the Supreme Court has never addressed a particular issue or applied a certain test to a specific type of proceeding. For instance, in *Foote v. Del Papa*, 492 F.3d 1026 (9th Cir. 2007) the Ninth Circuit affirmed the district court's denial of a petition alleging ineffective assistance of appellate counsel based on an alleged conflict of interest because no Supreme Court case has held that such an irreconcilable conflict violates the Sixth Amendment. *Id.* at *3-4. Similarly, in *Nguyen v. Garcia*, 477 F.3d 716 (9th Cir. 2007), the Ninth Circuit upheld the state court's decision — finding that *Wainwright v. Greenfield*, 474 U.S. 284 (1986) did not apply to a state court competency hearing — because the Supreme Court has not held that *Wainwright* applied to competency hearings and thus, was not contrary to clearly established federal law. *Id.* at 718, 727. Also, in *Locke v. Cattell*, 476 F.3d 46 (9th Cir. 2007), the Ninth Circuit affirmed the denial of a federal habeas petition based on a proposed violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) concluding that, because no Supreme Court case supported petitioner's claim that his admission to a crime transformed a police interview into a custodial interrogation, the state court's decision denying relief was not unreasonable under AEDPA. *Cattell*, 476 F.3d at 53. Most recently, in *Cook v. Schriro*, __ F.3d __, 2008 WL 441825 *1, *10 (9th Cir. 2008), the Ninth Circuit concluded that under AEDPA, defendant Cook's right to due process was not violated by a consistency clause[4/] in his co-defendant's plea agreement because there was no United States Supreme Court precedent establishing the unconstitutionality of the clause in plea agreements. Thus, the court concluded that, "[b]ecause it is an open question in the Supreme Court's jurisprudence," the consistency clause was not contrary to or an unreasonable application of clearly established federal law, and did not warrant federal habeas relief. *Id.*, citing *Carey v. Musladin*, __ U.S.__, 127 S.Ct. at 654.

Accordingly, because *Superintendent v. Hill*, 472 U.S. 445, 455-56 (1985) applied the

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4. The consistency clause in Cook's co-defendant's plea agreement required consistency in his interview statements and trial testimony. (*Cook*, __ F.3d __, 2008 WL 441825 at *10.)

some-evidence standard to a prison disciplinary hearing and Johnson challenges his 2006 parole consideration hearing, the some-evidence standard does not apply. Because *Greenholtz* is the *only* United States Supreme Court authority describing the process due at a parole consideration hearing when an inmate has a federal liberty interest in parole, the *Greenholtz* test, not the some-evidence standard, should apply in this proceeding. Regardless, Respondent recognizes that the Ninth Circuit has held otherwise, most recently in *Irons v. Carey*, 505 F.3d 846, and will argue this case accordingly.

D. Johnson's Petition Should Be Denied Because There Is Some Evidence Supporting the Board's Decision and — as Required by AEDPA — the State Court Decision Upholding the Board's Parole Denial Is Based on a Reasonable Application of the Facts in Light of the Evidence Presented.

Assuming Johnson has a federally protected liberty interest in parole, and if the "minimally stringent" some-evidence standard applies, then the requirements of due process are satisfied if there is "any evidence in the record that could support the conclusion reached by the board." *See Hill*, 472 U.S. at 455-56 (applying some-evidence standard to prison disciplinary hearing). The some-evidence standard "does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence;" rather, it assures that "the record is not so devoid of evidence that the findings of the . . . board were without support or otherwise arbitrary." *Id*. at 457. Thus, both the "reasonable application" standard of AEDPA and the some-evidence standard of *Hill* are very minimal standards.

Although Johnson invites the Court to re-examine the facts of his case and re-weigh the evidence presented to the Board, neither AEDPA nor *Hill*'s some-evidence test permit this degree of judicial intrusion. Johnson bears the burden of proving that the state court's factual determinations were objectively unreasonable. 28 U.S.C. § 2254(e)(1); *Hill*, 472 U.S. at 457; *Juan H. v. Allen*, 408 F.3d 1262, 1270 (9th Cir. 2005).

Moreover, in assessing the state court's review of Johnson's claims, not only should the appropriate deference be afforded under AEDPA to the state court's review, but deference is also due to the underlying Board decision. The Supreme Court has recognized the difficult and sensitive task faced by the Board members in evaluating the advisability of parole release.

Greenholtz, 442 U.S. at 9-10. Thus, contrary to Johnson's belief that he should be paroled based on the evidence in support of parole presented at the hearing (*see generally*, Petn.), the Supreme Court has stated that in parole release, there is no set of facts which, if shown, mandate a decision favorable to the inmate. *Id.* Instead, under the some-evidence standard, the court's inquiry is limited solely to determining whether the state court properly found that the Board's decision to deny parole is supported by some evidence in the record, *i.e.*, any evidence. *Hill*, 472 U.S. at 455.

In this case, the San Mateo County Superior Court concluded that there was some evidence supporting the Board's decision denying Johnson parole. (Ex. F.) First, the court concluded that there was some evidence supporting the Board's conclusions that Johnson had a callous disregard for Foots, that he currently lacked sincerity and remorse for his crime, and that he failed to have adequate parole plans. (*Id.* at 7-9; Ex. B.) Moreover, the court rejected Johnson's argument that the Board improperly relied on immutable factors, noting that several of the factors were subject to change over time, *e.g.*, Johnson's honesty, remorse, and his parole plans. (*Id.* at 8-9.) Second, the court also found that Johnson's claim regarding the Board's alleged underground policy of initially denying inmate's parole was irrelevant because the Board made specific findings justifying its decision to deny Johnson parole. (*Id.* at 9-10.) Third, the court found that there was no evidence of a conflict of interest or bias by the district attorney. (*Id.* at 11.) Finally, the court concluded that the Board did not act arbitrarily in evaluating Johnson's commitment offense and in recommending rehabilitative activities while in prison. (*Id.*) This is a reasonable application of the minimal some-evidence test.

Thus, if the some evidence test applies, the state court denials were not an unreasonable application of clearly established United States Supreme Court law, nor did the state courts unreasonably determine the facts. Instead, the state court properly determined that there is some evidence in the record supporting the Board's decision, and Johnson's Petition should be denied.

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E. No Clearly Established United States Supreme Court Law Precludes the State Courts from Upholding the Board's Reliance on Johnson's Commitment Offense to Deny Him Parole.

Johnson contends that the Board violated his federal due process rights by relying on immutable factors to find him unsuitable for parole. (Petn. at 10-14.) Yet, there is no clearly established federal law as determined by the United States Supreme Court that precluded the Board's reliance on Johnson's crime as a reason to find him unsuitable for parole. *Musladin*, 127 S. Ct. at 654; *Landrigan*, 127 S. Ct. at 1942. Although the Ninth Circuit's recent holdings suggest that continued reliance on the commitment offense may violate due process at some future date (*see, e.g., Irons*, 505 F.3d at 854 (citing *Biggs v. Terhune*, 334 F.3d. 910, 916-17 (9th Cir. 2003); *Hayward v. Marshall*, 512 F.3d 536, 547, fn. 10 (9th Cir. 2007) (court concluded that Governor's continued reliance on Hayward's commitment offense violated due process, but expressly limited its holding to the facts of Hayward's case and the nature of his specific conviction offense), these holdings are irrelevant when conducting an AEDPA analysis. *Plumlee*, *supra*, 512 F.3d at 1210 ("What matters are the holdings of the Supreme Court, not the holdings of lower federal courts").

Indeed, the Supreme Court recently highlighted the tight constraints imposed by AEDPA:

> Because our cases give no clear answer to the question presented, let alone one in [Petitioner's] favor, "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'" *Musladin*, 549 U.S. at ___, 127 S. Ct. 649, 654 (quoting 28 U.S.C. § 2254(d)(1)). Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized.

Van Patten,___ U.S. ___, 128 S.Ct. at 747. Thus, because the Board's reliance on Johnson's commitment offense to deny parole is supported by California state law (Cal. Pen. Code, §3041; *Dannenberg*, 34 Cal.4th 1061, 1094 (2005)) and such reliance is not contrary to any clearly established United States Supreme Court law, Johnson's argument is without merit.

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F. Johnson Cannot Demonstrate that the State Court Unreasonably Rejected His Remaining Claims or Acted Contrary to United States Supreme Court Law.

1. Johnson's argument that the Board has an underground policy of denying parole during an inmate's initial parole consideration hearing is irrelevant because the Board made specific findings justifying its decision.

In addition to challenging the sufficiency of the evidence, Johnson also contends that he was denied parole because the Board has an underground policy of denying parole to an inmate appearing for his initial parole consideration hearing. (Petn. at 16-17.) Johnson's allegation both fails to state a federal claim and is without merit. Thus, Johnson cannot establish a claim for relief.

As an initial matter, Johnson's allegation fails to implicate a federal claim to the extent it is based on his construction of the state statutes and regulations regarding the manner in which the Board determines suitability for parole. Thus, Johnson's claim is predicated on state law and not cognizable in federal habeas corpus. 28 U.S.C. § 2254(a); *Rose v. Hodges*, 423 U.S. 19, 21 (1975); *Gutierrez v. Griggs*, 695 F.2d 1195, 1197-1198 (1983). Moreover, even if Johnson is alleging that the state court erroneously rejected this claim, a federal court may not challenge a state court's interpretation or application of state law, *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985), or grant relief "on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41 (1984). Accordingly, the Petition should be denied as to this claim.

Moreover, even if addressed on the merits, Johnson cannot show that the state court unreasonably rejected his claim or acted contrary to United States Supreme Court law. Indeed, the superior court noted that even if the Board has acted arbitrarily in other cases, the record reflected that in denying Johnson parole, the Board made multiple factual findings, each of which were more than independently sufficient to justify his parole denial. (Ex. E at 10.) The court noted that the Board properly considered the relevant regulatory factors and that based on these factors — including the gravity of the commitment offense, Johnson's institutional behavior, and psychological evaluations — there was some evidence supporting the Board's decision denying Johnson parole. (*Ibid.*)

2. There is no evidence that the district attorney opposed Johnson's parole based on a conflict of interest or unreasonable bias.

Johnson also contends that the district attorney had a conflict of interest and was unreasonably biased in opposing his parole. (Petn. at 18-21.) His contention is based on a prior assistant district attorney allegedly revoking Johnson's plea agreement after the assistant district attorney failed to get a conviction in another case based on Johnson's testimony. (*Id.*) Again, Johnson's claim fails to allege a federal claim and is without merit. Indeed, the Board may properly consider and rely on the district attorney's opposition to Johnson's parole. (Cal. Pen. Code § 3042; see also *In re Dannenberg*, 34 Cal. 4th at 1085 [public input regarding parole suitability may be influential and even decisive].) Moreover, as stated above, even if Johnson is alleging that the state court erroneously rejected this claim, a federal court may not challenge a state court's interpretation or application of state law, *Middleton*, 768 F.2d at 1085, or grant relief "on the basis of a perceived error of state law." *Pulley*, 465 U.S. at 41. Accordingly, the Petition should be denied as to this claim.

Alternatively, the superior court did not act contrary to United States Supreme Court law and reasonably concluded that there was no evidence that the district attorney's opposition was a function of bias. (Ex. E at 11.) The court also noted that Johnson has made several attempts to challenge the rescission of his plea agreement and that his claims have been previously rejected. (*Ibid.*)

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CONCLUSION

Johnson received all the process he was due under clearly established Supreme Court authority. Moreover, the record reflects that the Board's decision was supported by some evidence. Thus, the state courts' adjudication of Johnson's claims was not contrary to, nor did it involve an unreasonable application of, clearly established federal law, or an unreasonable determination of the facts. Accordingly, Johnson's Petition should be denied.

Dated: March 5, 2008

Respectfully submitted,

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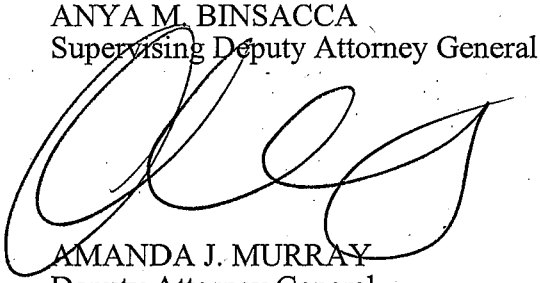

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Johnson v. Campbell**

No.: **C 07-2921 JSW**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **March 5, 2008**, I served the attached

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS; MEMORANDUM OF POINTS AND AUTHORITIES

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

La Merle R. Johnson, J-92682
Mule Creek State Prison
P.O. Box 409060
Ione, CA 95640-9060
In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **March 5, 2008**, at San Francisco, California.

M.M. Argarin
Declarant

Signature

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